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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

QUAD C CORPORATION and
ASSOCIATED GENERAL CONTRACTORS
OF CALIFORNIA, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
CALIFORNIA STATE COUNCIL OF CARPENTERS,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners Quad C Corporation[1] and the Associated General Contractors of California respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1981, rehearing of which was denied on March 18, 1981.

QUESTIONS PRESENTED

1. Whether one labor organization with two sub-divisions may apply differing standards to employers such that some employers are permitted to have certain specified work performed by union members under one collective bargaining agreement and other employers are not permitted to have that same work performed under that same agreement.

2. When a construction industry employer has established a relationship with a union that comes within Section 9(a) of the National Labor Relations Act (29 USC §159(a)), may that employer

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[1]Quad C Corporation has no parent, subsidiary or affiliate corporations.

be required to enter into a pre-hire agreement, as defined by Section 8(f) of the Act, (29 USC §158(f)) with a second representative of the same employees covered by the collective bargaining agreement with the Section 9 representative.

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CASES:

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OPINIONS BELOW

The initial opinion and order of the National Labor Relations Board is reported at 246 NLRB No. 75 and is attached hereto as Appendix A, infra, page App. 4. The judgment of the Ninth Circuit Court of Appeals, enforcing the Board's Order, appears in Appendix A hereto, infra, page App. 1. The Ninth Circuit's Order denying rehearing appears at Appendix A, infra, page App. 6.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 23, 1981. A timely petition for rehearing was denied on March 18, 1981, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTES INVOLVED

The provisions of 29 USC §158(a)(5), 29 USC §158(f) and 29 USC §159(a) are involved in the questions presented herein. These appear in Appendix A, infra, page App. 7 et seq.

STATEMENT OF THE CASE

This matter was before the NLRB on an unfair labor practice charge found for respondent State Council of Carpenters. The Board thereafter sought and obtained enforcement of its Order from the Ninth Circuit Court of Appeals.

Petitioner Quad C Corporation was founded in 1972 in San Francisco. At the time of its formation, Quad C obtained a general contractor's license, but at all times the work it performs has remained the same. That work consists of sub-contracting "interior systems" in commericial construction, which includes fireproofing the steel frame (performed by members of unions not here at issue), laying out the partition lines and tracks for the walls and floors and erecting the metal studs to which the walls and ceilings will be fixed (performed by members of the United Brotherhood of Carpenters and Joiners of America). Thereafter, either gypsum wallboard ("drywall" or "sheetrock") is attached to these wall and ceiling frames, by members of the Carpenters Union, or lath and plaster are applied, by members of other

unions, depending on what is required.

Approximately 30% of the work performed by Quad C is performed by carpenters and of that work, only 5% is the actual application of drywall to the wall. The remaining 95% of the carpenters' work consists of layout and framing of the walls, setting door frames, hanging doors, laying hardware and related work.

From its inception, Quad C has been signatory to the Carpenters 46 Counties Agreement, which is negotiated by the 46 Counties Conference Board for the Union, and by the Associated General Contractors of California ("AGC") for the employers. When Quad C needs carpenters to perform the work described above, it contacts the carpenters' Locals, requests that they send "experienced sheetrock people" and the Locals dispatch these, with a dispatch slip from the 46 Counties Conference Board. All of the Locals are members of the 46 Counties Conference Board and are affiliates of the State Council of Carpenters. Since 1957 the State Council of Carpenters has negotiated a Drywall Master Agreement (and memorandum agreements

thereunder), with the California Drywall Contractors Association. The State Council and the 46 Counties Conference Board have no direct relationship with each other as to bargaining.

The State Council has asserted in the proceedings heretofore that drywall work is not covered by the 46 Counties Agreement with AGC. However, it is undisputed in the Record that other AGC members perform that work under that Agreement. At the time of the hearing before the National Labor Relations Board, Quad C had eight carpenters working for it who were employees lent to it by large general contractors. These people were covered by the 46 Counties Agreement. Similarly, in the Santa Clara area, less than 50 miles from San Francisco, under the 46 Counties Agreement, the Union will dispatch a carpenter with drywall experience.

In 1974, while Quad C President, Robert Chaney, was in the hospital, his partner Gene Connell was informed by the Carpenters' Union that it would not dispatch any sheetrock carpenters unless Quad C signed the drywall memorandum

agreement. Mr. Connell signed. As soon as Mr. Chaney returned to work he notified the State Council, both orally and in writing, that Quad C had not been and would not be a party to the Drywall Master Agreement. These notices were rejected by the State Council as untimely under the provisions of that Agreement. Nonetheless, from May 12, 1975 Quad C refused to return Drywall Trust Fund forms or pay into the Drywall Trusts. Rather, Quad C paid like monies into the 46 Counties Trust, which provided the same coverage to the employees.

On May 31, 1977 Quad C sent another letter to the State Council informing them that Quad C had not been bound by the 1974-1977 Drywall Master Agreement and that in any case it would ". . . not be a party to the Drywall Master Agreement with the contract term beginning August 1, 1977." This letter was accepted by the State Council as a timely notice of Quad C's intention to terminate its contractual relationship under the 1977-1980 Drywall Master Agreement and requested a meeting to negotiate a new agreement to cover Quad C's carpenters.

In response, Quad C informed the State Council that it was a member of AGC, and that AGC had advised Quad C that ". . . the work it [Quad C] performs is covered under the AGC agreements with [the 46 Counties Conference Board]."

The State Council reiterated its demand to bargain, and Quad C replied that AGC was its bargaining agent and that the work in question was covered by existing agreements. The State Council next directed its bargaining demand to AGC. AGC responded that the 46 Counties Agreement covers all carpentry work performed by its member Quad C, and further that AGC did not have ". . . the 'power of attorney' from Quad C to represent them . . ." in the proposed negotiation. The State Council filed the unfair labor practice charge underlying this action thereupon, and the Board found a §158(a) violation.

REASONS FOR GRANTING WRIT

Assuming arguendo Quad C lawfully executed an Agreement pursuant to 29 USC §158(f) with the State Council, it cannot, as a matter of policy, be

given precedence over a pre-existing Section 9 relationship. Section 9 requires exclusive bargaining and creates a relationship given great protection by the National Labor Relations Act. NLRB v. Iron Workers, Local 103, 434 U.S. 335 (1978), compels a finding that an existing Section 9 relationship takes priority over a conflicing 8(f) contract. To find otherwise would be to create massive destabilization in construction industry labor relations. Any employer dissatisfied with the majority representative could enter into an 8(f) contract with a competing group and effectively decertify the existing union.

The decisions below are tantamount to this destabilization rule. Quad C had, in 1972, and continues to have, a Section 9 relationship with the 46 Counties Conference Board, established initially through an 8(f) contract. Nonetheless, the Board so elevated the 8(f) contract with the State Council that it negated the long-standing relationship with the 46 Counties. In NLRB v. Iron Workers, supra, this Court cited with approval the

Board's view of 8(f) agreements:

> Until [an 8(f) attains majority support] the pre-hire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority of the employees and recognized as such by the employer.
> at 2335

When, in 1974, over Quad C's repeated objections, Quad C entered into an 8(f) contract with the State Council, and maintained its 46 Counties contract, no presumption could arise that its carpenters continued membership in the same local Unions had shifted the Section 9 relationship to the State Council. Rather, the existing Section 9 relationship under the 46 Counties persisted, and was reaffirmed by all the acts of Quad C.

The relevant conduct includes Quad C's repeated attempts to withdraw from the State Council Agreement and Quad C's refusal to comply with its terms. This behavior in itself constitutes termination of the agreement. Carpenters District Council v. Blake Construction

Co., 457 F.Supp. 830 (E.D.Va. 1978); R.J. Smith Construction Co., 191 NLRB 695 (1971). Certainly, absent some affirmative showing, no presumption of a Section 9 relationship with the State Council can arise at any point in this history.

Indeed, since the 46 Counties Conference Board and the State Council are both affiliates of the United Brotherhood of Carpenters, it would be reasonable to assume that, as this dispute with Quad C developed, the 46 Counties Board would have indicated their own withdrawal in favor of the State Council if that was the Union's position as to the appropriate representative of its members. No such event occurred. The AGC's Assistant Labor Relations Director testified that on several occasions he discussed Quad C's relationship under the 46 Counties Agreement with the 46 Counties Board. The record is silent as to the content of these discussions; surely counsel for the Board would have elicited the evidence that the 46 Counties desired an end to their majority status for the

benefit of the State Council if such had occurred. Petitioners urge that the United Brotherhood of Carpenters and Joiners of America had an affirmative obligation to designate the sole appropriate representative of the Quad C carpenters, using as its standard the practices employed with other employers. After such designation the non-representative body must affirmatively withdraw from any relationship with the employer.

By the failure of the State Council to achieve majority status, and the continued majority status of the 46 Counties Board, this employer should have no obligation to bargain with the State Council. Rather, policy demands that the majority status of the 46 Counties Agreement be protected and that Quad C be free to maintain that relationship only so long as the employees do not chose an alternate representative.

CONCLUSION

For the reasons presented above, a writ of certiorari should issue to

review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 10, 1981

APPENDIX A

1. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. NATIONAL LABOR RELATIONS BOARD, Petitioner, v. QUAD C CORPORATION AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, Respondents, and CALIFORNIA STATE COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor, No. 79-7686.

JUDGMENT. Before: WALLACE and FARRIS, Circuit Judges and KING (Honorable Samuel P. King, Chief District Judge of the District of Hawaii, sitting by designation), Chief District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of an order issued against Respondents Quad C Corporation, and Associated General Contractors of California, San Francisco, California, their officers, agents, successors, and assigns, on November 14, 1979. The Court heard argument of respective counsel on January 14, 1981, and has considered the briefs and transcript of record filed in this cause. On February 9, 1981, the Court being fully

advised in the premises issued its opinion enforcing the Board's order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondents, Quad C Corporation and Associated General Contractors of California, San Francisco, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with California State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, (hereinafter called the Union) as the exclusive representative of the following appropriate bargaining unit:

> All journeymen and trainee drywall installers, employed by Quad C Corporation with the State of California, but excluding all other employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interferring with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7

of the National Labor Relations Act, (hereinafter called the Act).

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union, as the exclusive representative of all employees in the appropriate unit, described above, with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at their offices and construction premises copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20, San Francisco, California of the National Labor Relations Board, after being duly signed by Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify the aforesaid Regional Director for Region 20, in writing, within 20 days from the date of this Judgment, what steps Respondents have taken to comply herewith.

Endorsed, Judgment Filed and Entered
/s/ Richard H. Deane

SO ORDERED:
JUDGES: J. Clifford Wallace, CJ; JEROME FARRIS, CJ, SAMUEL P. KING, DJ

2. NATIONAL LABOR RELATIONS BOARD. QUAD C CORPORATION AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, San Francisco, Calif. and CARPENTERS, CALIFORNIA STATE COUNCIL, Case No. 20-CA-13623, November 14, 1979, 246 NLRB No. 75, Administrative Law Judge Jerrold H. Shapiro.

Before Fanning, Chairman; Penello and Truesdale, Members.

Construction contractor and multi-employer association violated Section 8(a)(5) of LMRA when they refused to bargain with union council for new bargaining agreement covering contractor's drywall installers. (1) Contractor contends that earlier drywall memorandum agreement it executed does not give rise to usual presumption of majority status on behalf of council because it was prehire agreement within meaning of Section 8(f) of Act, but all of contractor's drywall installers were members of local unions affiliated with council; (2) it is contended that drywall memorandum agreement was product of coercion due to council's threat to cease referring drywall installers, but such conduct is barred by statute of limitations, and in any event, all of contractor's drywall installers were members of local unions affiliated with council; (3) it is contended that unit of contractor's drywall installers is not appropriate because they perform substantial amount of conventional carpentry work, but they are readily identifiable and homogeneous group of construction tradesmen

with separate community of interest, and contractor has always treated them as separate unit; (4) contractor contends that its drywall installers are covered by carpentry master agreement which multi-employer association entered into with council's international, but international and its affiliates, including council, intended that drywall installers would not be covered by carpentry master agreement but by council's drywall master agreement, to which contractor obligated itself when it executed drywall memorandum agreement; (5) contractor knew when it signed drywall memorandum agreement that as of that date terms and conditions of employment of its drywall installers were governed by drywall master agreement, and when contractor timely terminated drywall master agreement, it was required to bargain with council for new agreement covering drywall installers.

3. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. QUAD C CORPORATION and ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, Respondents, and CALIFORNIA

STATE COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Intervenor. ORDER. Before: WALLACE and FARRIS, Circuit Judges, and KING (Honorable Samuel P. King, Chief Judge, United States District Court, District of Hawaii, sitting by designation), District Judge. Respondent's petition for rehearing is denied.

4. United States Code, Title 29 §158(a) It shall be an unfair labor practice for an employer-...(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

5. United States Code, Title 29 §158(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not

established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final

proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

6. United States Code, Title §159(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not consistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been

given opportunity to be present at such adjustment.